



**AIRCRAFT OWNERS AND PILOTS ASSOCIATION**

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February 15, 1995

Secretary  
Federal Communications Commission  
Room 222  
1919 M Street NW  
Washington, DC 20554

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FCC MAIL ROOM

RE: RM-8577

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Secretary:

The Aircraft Owners and Pilots Association (AOPA), representing 335,000 aircraft owners and pilots strongly objects to the Cellular Telecommunications Industry Association's (CTIA) petition to the Federal Communications Commission (FCC) for the preemption of state and local regulation of communication tower siting and construction.

CTIA is petitioning the FCC to issue a notice of proposed Rulemaking to preempt state and local regulation of tower sites for commercial mobile radio services. AOPA suggests that CTIA has not demonstrated any legal authority for such FCC preemption.

The United States Supreme Court has indicated that preemption such as that suggested by the CTIA, which would leave no room for the states to act in the regulation of towers, may only be mandated by Congress. The Court indicated that any analysis of preemption begins with the assumption that the historic police powers were not to be superseded unless that was "the clear and manifest purpose of Congress." Congress did include some preemptive language in the Communications Act of 1934, as amended. However, Congress specifically prohibited state and local governments only from regulating the entry of or the rates charged by any commercial or private mobile service. The Act does not even discuss state and local regulation of tower sites for commercial mobile radio services. Instead, the Act specifically reserves to the States the right to regulate other terms and conditions. This would hardly indicate that the clear and manifest purpose of Congress was to preempt the regulation of such tower sites.

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AOPA suggests that publishing an NPRM dealing with this issue is not appropriate until FCC has determined whether or not it has the legal authority from Congress to preempt state and local governments from regulating the location of tower sites for commercial mobile radio services, and we believe that the answer to this question is "no."

This petition is at odds with the established and Federally recognized responsibility of state and local governments concerning tall towers. Every obstruction affecting navigable airspace that is studied under Part 77 of the Federal Aviation Regulations; Objects Affecting Navigable Airspace, is issued an aeronautical determination of hazard or no hazard by the Federal Aviation Administration (FAA). Each determination has as its last paragraph the following statement:

"This determination, issued in accordance with FAR Part 77 concerns the effect of this proposal on the safe and efficient use of navigable airspace by aircraft and does not relieve the sponsor of any compliance responsibilities relating to law, ordinance, or regulation of any Federal, State, or local government body."

What this means is that while the FAA has made a decision as to the efficient use of airspace, it acknowledges that there are other authorities (state and local) with control of the appropriate use of property beneath airspace. It should be noted that the Federal Aviation Act of 1958 specifically withholds from the FAA statutory authority over ground structures in recognition of "states' rights."

There is other FAA language that recognizes the authority of a local government body in controlling the use of property near an airport. Any operator of an airport that receives federal money for airport improvement is obligated to comply with the Part V Assurances. Among those assurances is a statement that the airport operator "...will take appropriate action, including the adoption of zoning laws to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff aircraft." (FAA Form 5100-100, Part V Assurances, paragraph 21)

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It should be clear that states and municipalities have the right to enact and enforce airport-compatible land use requirements. Some forty states have recognized this obligation and have chosen to enact legislation aimed at gaining some control of the height and location of certain structures.

There are many ways to accomplish height zoning, all of which have strengths and weaknesses. Tall structure zoning should begin with state legislation requiring adoption of appropriate zoning by the operators of public-use airports. States should then assist local governments in adopting and administering cooperative ordinances and coordinate these efforts with the FAA and FCC. This is the only way to establish the necessary rapport between federal, state, and local agencies to properly control tall structures.

Sincerely,

A handwritten signature in cursive script, appearing to read "Mel Bailey".

Melissa K. Bailey  
Director  
Airspace and System Standards  
Regulatory Policy



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**CERTIFICATE OF SERVICE FCC MAIL ROOM**

I hereby certify that on January 16, 1995 I placed in the United States mail, postage prepaid, a copy of the foregoing comments addressed to the following:

Michael F. Altschul  
Vice President and General Counsel  
Cellular Telecommunications Industry Association  
1250 Connecticut Avenue, NW  
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Washington, DC 20036

Melissa K. Bailey  
Director  
Airspace and System Standards  
Regulatory Policy